APPENDIX 1

Extract f.om Federal Power Act

"Sec. 4. General powers of commission

The Commission is hereby authorized and empowered—

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect

shall be made by the commission and shall become a part of the records of the Commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection."—16 U.S.C. § 797(e).

APPENDIX 2

Excerpts from Amendment No. 2 to Power Authority's Application for License

Project No. 2216

AMENDMENT No. 2

to

APPLICATION

of

POWER AUTHORITY OF THE STATE OF NEW YORK

To The

FEDERAL POWER COMMISSION

For a License under Section 4 (e) of the Federal Power Act and Public Law 85-159, approved August 21, 1957, for a Power Project to be located in Niagara County, State of New York

FOR DEVELOPMENT

of the

NIAGARA RIVER

August 28, 1957

Power Authority of the State of New York hereby further amends the above described application filed with the Federal Power Commission on August 20, 1956, and first amended on September 19, 1956, as follows:

(1) Change the title page to read as follows:

APPLICATION

of

POWER AUTHORITY OF THE STATE OF NEW YORK

To The

FEDERAL POWER COMMISSION

For a License under Section 4 (e) of the Federal Power Act and Public Law 85-159, approved August 21, 1957, for a Power Project to be located in Niagara County, State of New York

FOR DEVELOPMENT

of the

NIAGARA RIVER

August 20, 1956

(2) Delete the first paragraph on page 1 and substitute the following:

1. Power Authority of the State of New York, having its office and principal place of business at The Coliseum Tower, 10 Columbus Circle, New York 19, N. Y., hereby makes application to the Federal Power Commission for a license to authorize, under Section

4 (e) of the Federal Power Act and Public Law 85-159, approved August 21, 1957 (Exhibit A-1, hereinafter referred to as "Public Law 85-159"), the construction, operation and maintenance of the project works described herein. . .

* * * * * * * * *

(7) Following the second paragraph on page 8, beginning after line 19, insert the following:

Sections 1 (b) (1) and 1 (b) (2) of Public Law 85-159 provide as follows:

"(b) The Federal Power Commission shall include among the licensing conditions * * * the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagree-

ment between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection."

The Attorney General of the State of New York has officially informed Applicant that these conditions are consistent with the provisions of the Power Authority Act, and Applicant will accept them.

(8) Delete the third full paragraph on page 10 (lines 24 through 40).

(9) Insert at the beginning of paragraph 12 on page 13 the following paragraphs:

Public Law 85-159 provides that seven specific licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, be included in the license to be issued under the law. These conditions include those mentioned above.

Subdivision 3 of Section 1005 of the Power Authority Act specifically permits Applicant to accept a license issued by the Federal Power Commission and "the terms and conditions therein imposed pursuant to law."

The Attorney General of the State of New York has given his opinion that all of the conditions required by Public Law 85-159 are consistent with the provisions of the Power Authority Act (Exhibit A) and that Applicant may accept a license containing all of such conditions. Applicant is willing to do so.

IN WITNESS WHEREOF, Applicant has caused its name to be hereunder signed by Robert Moses its Chairman and its corporate seal to be hereto affixed by W. S. Chapin, its General Manager and Secretary, each thereunto duly authorized, this 28th day of August, 1957.

POWER AUTHORITY OF THE STATE OF NEW YORK

By R. MOSES
Chairman

(SEAL)

Attest: W. S. CHAPIN,
General Manager and Secretary

APPENDIX 3

Letter of Petitioner's Counsel

ELY, MCCARTY AND DUNCAN

COUNSELORS AT LAW

Tower Building
Washington 5, D. C.

Telephone

Metropolitan 8-6474
Teletype WA 245

Northcutt Ely
Robert L. McCarty
C. Emerson Duncan, II
Charles F. Wheatley, Jr.

September 11, 1957

Scott B. Lilly, Esquire
Power Authority of the State of New York
The Coliseum Tower
10 Columbus Circle
New York 19, New York

Dear Mr. Lilly:

This will confirm our telephone conversation of September 10. I am enclosing for your information a copy of the designation of record which was filed yesterday with the Clerk of the Court of Appeals. Another copy was mailed yesterday to Mr. Moore.

As I explained to you, our principal reason for wishing to see the decision of the Court of Appeals vacated is the doubt cast by the language of the opinion on the validity of treaty reservations not necessarily restricted to the 1950 Treaty with Canada. We have deemed it necessary, therefore, to petition for a writ of certiorari for the express purpose of requesting the Supreme Court to declare the judgment of the Court of Appeals moot, and to vacate the opinion.

We have noted that the Power Authority has amended its application for a license to provide that the application is made under the provisions of Public Law 85-159. The Commission's decision to expedite the issuance of the license is to be commended.

I look forward to seeing you in Washington when the hearings on Docket R-129 reconvene.

Cordially,

C. EMERSON DUNCAN II
For Ely, McCarty and Duncan

CED:mw
Enclosure

APPENDIX 4

Order of Federal Power Commission Issuing License

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Project No. 2216

In the Matter of

Power Authority of the State of New York

ORDER ISSUING LICENSE (MAJOR)

(Issued September 19, 1957)

Application was filed August 20, 1956, as amended September 19, 1956 and September 9, 1957, by Power Authority of the State of New York, (Applicant) for a license under Section 4 (e) of the Federal Power Act (hereinafter referred to as the Act) and Public Law 85-159, 85th Congress, approved August 21, 1957 (71 Stat. 401), for pro-

posed Project No. 2216 (Niagara Project) to be located on the Niagara River, a navigable waterway of the United States and an international boundary stream, in the County of Niagara, the City of Niagara Falls and the Towns of Niagara and Lewiston—all within the State of New York.

Applicant proposes to construct and operate hydroelectric facilities to utilize all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the February 27, 1950 treaty between the United States and Canada. (1 UST 694).

By our orders issued October 25 and November 1, 1956, and September 12, 1957, respectively, intervention was granted to: Niagara Mohawk Power Corporation, Attorney General of the State of New York on behalf of the people of New York, National Rural Electric Cooperative Association and 28 rural electric cooperative associations distributing electric power in the States of New York, Ohio and Pennsylvania, Rochester Gas and Electric Corporation, County of Niagara, New York, City of Niagara Falls, New York, American Public Power Association, Municipal Electric Utilities Association of New York State, City of Jamestown, New York, Town of Lewiston, New York and International Paper Company of New York, New York.

By our order issued September 12, 1957, we have scheduled a public hearing to be held commencing October 1, 1957 respecting the issues raised by Interveners City of Niagara Falls, Town of Lewiston, and County of Niagara, New York, concerning their opposition to the water conduits and the reservoir area of the project as proposed by Applicant, and respecting the issues raised by Intervener International Paper Company concerning its claim to water rights involved in *Federal Power Commisison* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239.

The Secretary of the Army and the Chief of Engineers in reporting on the application have recommended certain terms and conditions for inclusion in the license, as hereinafter provided.

The Secretary of the Interior has not submitted his report on the application but we understand it will be filed in the near future. Any conditions he may recommend for inclusion in the license will relate to conservation of fish and wildlife resources and may be considered later.

Public Law 85-159, supra authorizes and directs the Commission to issue a license to Applicant for the construction and operation of the Niagara Project under the terms thereof and those of the Federal Power Act, and subject to certain special conditions hereinafter included in this license.

The Commission finds:

(1) The proposed project would affect navigable waters of the United States.

(2) The proposed project would consist of:

(a) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the Licensee or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits filed by Applicant, the approval of which by the Commission shall be as hereinafter provided.

(b) All project works comprising:

(1) A concrete intake and gate structure in and near Niagara River about three miles above the Falls;

(2) A water conveyance system about four miles long extending from the intake gate to a pumping-generating plant and a regulating reservoir in the Town of Lewiston;

(3) A pumping-generating plant in the Town of Lewiston with twelve pump-generator units rated 20,000 kilowatts each as generators;

(4) A regulating reservoir in the Town of Lewiston;

(5) A water conduit from the pumping-generating plant and regulating reservoir to the main Lewiston generating plant;

(6) The main Lewiston generating plant in the Town of Lewiston with forebay, penstocks, thirteen 150,000 kilowatt generating units, step-up transformers, and high-tension lines to the switchyard;

(7) A switchyard near the pumping-generating plant;

the location, nature, and character of which project works are more specifically shown and described by certain exhibits filed by Applicant.

(c) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(3) The Applicant is a corporate municipal instrumentality, a political subdivision of the State of New York, organized and existing under the laws of the State of New York, and is a municipality within the meaning of Section 3 (7) of the Act; and it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.

(4) Public notice of the application has been given.

(5) The proposed project will not affect any Government dam, and the issuance of a license therefor, as hereinafter provided, will not affect the development of any water resources for public purposes which should be undertaken by the United States.

(6) Applicant has submitted satisfactory evidence of its financial ability to construct the proposed project.

(7) The proposed project is best adapted to a comprehensive plan for development of the Niagara River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(8) The installed horsepower capacity of the proposed project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charges is 2,920,000 horsepower. The energy to be generated at the proposed project will be marketed in accordance with the provisions of Public Law 85-159, *supra*.

(9) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the cost of administration of Part I of the Act as hereinafter provided is reasonable.

(10) It is desirable to reserve for future Commission determination what transmission lines, if any, should be included in this license.

(11) The project exhibits filed with the application are being revised. Applicant should be required to file revised project exhibits as hereinafter provided.

The Commission orders:

(A) This license is issued to Power Authority of the State of New York (hereinafter referred to as the Licensee) under the provisions of Section 4 (e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401), for a period of 50 years, effective as of September 1, 1957, for the construction, operation and maintenance of the Niagara Project No. 2216, located on the Niagara River, a navigable water of the United States and an international boundary stream, in the vicinity of Niagara Falls, for the purpose of developing all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the 1950 treaty between the United States and Canada, subject to the terms and conditions of the Federal Power Act, and the aforementioned Public Law 85-159, both of which are incorporated by reference as part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act, and subject to the applicable provisions of the aforementioned 1950 treaty between the United States and Canada.

(B) This license is also subject to the terms and conditions set forth in Form L-4, December 15, 1953, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters of the United States" (16 FPC 1284), which terms and conditions, described as Articles 1 through 18 therein, except for Articles 7, 14 and 15 thereof, and except that the Chief of Engineers, Department of the Army, shall have supervision of stream gaging operations under Article 6 thereof in lieu of the District Engineer of the United States Geological Survey, are attached hereto and made a part hereof; and

subject to the following special conditions set forth herein as additional articles:

Article 19. The Licensee shall pay to the United States the following annual charge:

For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, one (1) cent per horsepower on the authorized installed capacity (2,920,000 horsepower) plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calendar year for which the charge is made.

Article 20. In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the Licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this article is sold to utility companies organized and administered for profit, the Licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

Article 21. The Licensee shall make a reasonable portion of the project power subject to the preference provisions of Article 20 available for use within reasonable economic transmission distance in neighboring States, but this article shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States.

The Licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the Licensee and the Power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the Licensee shall deal only with such agency in that State. The arrangements made by the Licensee for the sale of power to or in such States shall include observance of the preferences in Article 20.

Article 22. The Licensee shall contract, with the approval of the Governor of the State of New York pursuant to the procedure established by New York law, to sell to the Licensee of Federal Power Commission Project No. 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by Project No. 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by Project No. 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from Project No. 16 was utilized: *Provided*, That the Licensee of Project No. 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both Licensees and approved by the Federal Power Commission which shall include the following (a) the Licensee of Project No. 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and right-of-way actually taken, and

(b) without limiting the generality of the foregoing, the Licensee of Project No. 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian raights, diversionary rights, or other rights relating to the diversion of use of water, whether founded on legislative grant or otherwise.

Article 23. The Licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in Article 20, and to the neighboring States in accordance with Article 21.

Article 24. In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the Licensee, consistent with Article 20 and 22.

Article 25. The Licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the Licensee's net investment in said project: *Provided*, That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the Licensee's net investment shall not exceed $15,000,000.

Article 26. The Licensee shall pay to the United States and include in its net investment in the project herein au-

thorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed. The Licensee shall also pay to the United States the United States share of the cost of operation, maintenance and replacements of the remedial works. The amounts to be paid under this article shall be hereafter determined by the Commission.

Article 27. The Licensee shall submit for Commission approval Exhibits F, J, and K, prepared in accordance with the Commission's rules and regulations, within two years from the effective date of this license.

Article 28. The Commission reserves the right to determine at a later date what transmission lines shall be included in this license as part of the project works.

Article 29. The Licensee shall commence construction of the project within one year from the effective date of this license, shall thereafter in good faith and with due diligence prosecute the construction, and complete the project within six (6) years from the effective date of this license.

Article 30. The Licensee, prior to starting construction of any portion of the project which would affect the operation of the existing terminal at the foot of Hyde Park Boulevard, shall: construct in the general vicinity of the intake structure, a terminal for the receipt of water borne commerce; excavate a channel alongside the terminal and connecting to the Federal channels in Niagara River to a depth to fully utilize the depths provided in the Federal channels; construct a suitable mainland access to the terminal; submit for Commission approval Exhibit L, general design drawings for these works in accordance with the Commission's rules and regulations; and transfer the

completed terminal facilities to the City of Niagara Falls without charge.

Article 31. The Licensee shall construct, operate and maintain or shall arrange for the construction, operation and maintenance of such fish facilities or protective devices for the purpose of conserving fish and wildlife resources, and comply with such reasonable modifications in project structures and operations in the interest of conserving fish and wildlife resources as may be prescribed hereafter by the Commission upon recommendation of the Secretary of the Interior.

Article 32. The Licensee shall at such times as the Commission may direct and to the extent that it is economically feasible to do so, and after notice and opportunity for hearing install additional units in the Lewiston and/or Tuscarora plants and make other project changes as may be found by the Commission to be best adapted to a comprehensive plan for improving and developing the Niagara River.

Article 33. The Licensee shall file revised Exhibit L drawings within 6 months from the issuance of this order and shall not begin construction of the project structures until the Commission approves the Exhibit L drawings for such structures.

Article 34. The final design of the intake structure shall be based on model tests.

Article 35. Licensee shall reimburse the United States for the cost of any model tests considered necessary by the Chief of Engineers to determine the effect of the intake structure together with the approach channel on navigation in the Niagara River.

(C) This order shall become final thirty (30) days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Act, and

failure to file such an application shall constitute acceptance of this license. In acknowledgement of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within sixty (60) days from the date of its issuance.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

IN TESTIMONY OF ACCEPTANCE of all the provisions and conditions of the license for Project No. 2216, Power Authority of the State of New York, this day of , 19 , has caused its corporate name to be signed by its Chairman, and its corporate seal to be affixed hereto and attested by its Assistant Secretary, pursuant to a resolution of its Board of Trustees duly adopted on the day of 19 , a certified copy of the record of which is attached hereto.

POWER AUTHORITY OF THE STATE OF NEW YORK

By

Chairman

Attest:

Assistant Secretary

(Executed in quadruplicate)

APPENDIX 5

Extract from Brief of Petitioners Before the Court of Appeals

The following is petitioners' statement of interest as it appears on pages 2 and 3 of the brief:

"THE INTEREST OF THESE INTERVENORS

"The American Public Power Association and the City of Jamestown, New York, sought and were granted leave to intervene in this cause in order to represent public power users in the marketing area serviceable by the proposed power development. One hundred nineteen public power agencies in Ohio, Pennsylvania, and New York, within transmission distance of 300 miles from the proposed project, are members of the American Public Power Association.

The intervenors desire the immediate development of the additional power potential made available to the United States by the 1950 Treaty with Canada. They desire, however, that that development be authorized by legislation which will follow the historic congressional pattern of providing preferences to local public agencies in the marketing of the power produced by a public development. The underlying difference between these intervenors and the Power Authority of the State of New York is the latter's persistent refusal to recognize in these smaller public agencies the preference it seeks for itself as just such a public agency under section 7 of the Federal Power Act. We are thus interested in sustaining the validity of the Senate's 1950 reservation, enacted, we think, for the very purpose of reserving to Congress the power to protect these same public agencies. Such agencies, within a transmission distance of 300 miles from this project, in Pennsylvania, Ohio, and New York, would require about 575,000 kilowatts, of the project's potential of 2,000,000 kilowatts, if all of these agencies took all of their power requirements from the Niagara project. Their present requirements would be much less, since some of these agencies already own some producing capacity. Their size is small but the principle involved is very large, and can be protected without hardship to the project."